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Constitutional Liberties and Statutory Construction

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CONSTITUTIONAL LIBERTIES AND STATUTORY CONSTRUCTION

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In time of war patriotic zeal frequently jeopardizes the liberties of those who through individual judgment, conscience, or ignorance support unpopular opinions. Courts inevitably are the arbiters of the resulting controversies; but their determinations are but a part of the total governmental and social action involved. Thus, when social stability is challenged all governmental action is tested by its ability to maintain popular support for an unified and aggressive program.

Within the span of one generation, two foreign wars and an internal economic depression have measured the vitality of our form of government. Without political disintegration, as in France, and without political regimentation, as in the dictatorships, popular government has been maintained. This test of unity is gratifying; particularly where, as in our form of government, the powers of government are separate and independent. It is the best evidence that at least on the fundamentals of government we have an unified society.

Unanimity of opinion, of course, has never been complete. But it is reassuring that during the present war there has been less divergence of view concerning our constitutional liberties than there has been in many more peaceful times. With but few exceptions, public opinion, executive, legislative, and judicial action have reflected a firmly settled judgment that even in war time individual liberty shall not be impaired.

The judiciary and the law-enforcing agencies are more directly on trial during these times than at any other. Charged with protecting minorities from the over-reachings of the majority, judicial decisions reflecting the majority's firm conviction in individual liberty must frequently appear to be in direct defiance of the will of the majority at a particular time and place. The success of the judiciary thus becomes linked with the poise of the majority and the willingness of public opinion to follow the dictates of judgment and abjure the temptations of emotion.

I.

Public opinion afforded little support to the judiciary prior to and during World War I. As a nation we were disunited, uncertain of purpose and intolerant of national, racial, and group identities. Many

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were opposed to war. Some favored war but believed that we were on the wrong side. Immigration was at its peak. Two states had just entered the Union. We were still a young nation—sprawling over a vast continent with inadequate channels of communication, we were as unprepared emotionally as we were militarily for entrance into our first major war.

In this setting, internal strife and controversy were inevitable. The balance between majority and minority was too close; soon both sides appealed to the courts for protection. The ensuing decisions in *Schenck v. United States,*[1] *Debs v. United States,*[2] *Abrams v. United States,*[3] *and Pierce v. United States*[4] marked out but scarcely resolved the controversy. The issue presented by various settings of fact was one of interpretation—of the ambit of the Espionage Act of 1917 and of its relation to the First Amendment.

It is too inclusive to say that statutory construction is the art of good judgment; but, indeed, this is much of it. It is equally clear that good judgment is difficult in bad surroundings. And it is now all too apparent that the best minds in World War I were required to exist in the intellectual slums of the then dominant public opinion. As Justice Brandeis pointed out, "The question in every case is whether the words . . . are used in such circumstances and are of such a nature as to create a clear and present danger . . . This is a rule of reason. Correctly applied, it will preserve the right of free speech both from suppression by tyrannous, well-meaning majorities, and from abuse by irresponsible, fanatical minorities. Like many other rules of human conduct, it can be applied correctly only by the exercise of good judgment, and to the exercise of good judgment calmness is, in times of deep feeling and on subjects which excite passion, as essential as fearlessness and honesty."[5]

That calmness did not exist is apparent from the manner of many of the opinions. There was much haggling over "the facts" and their proper "interpretation." Lesser attention was given the relation between the federal statutes and the constitutional amendments. Formal inquiry into the intent and purpose of the statutory and constitutional enactments was given little attention. The stage was so small that any action of the participants was dramatic.

Ironically for those of us who believe that the function of interpretation is the discovery and application of legislative intention

[1] 249 U. S. 47 (1919).
[2] 249 U. S. 211 (1919).
[3] 250 U. S. 616 (1919).
[4] 252 U. S. 239 (1920).
[5] See *supra* note 3 at p.

and the respect of legislative policy, the one constructive principle which emerged from the first World War litigation was the "clear and present danger" rule advanced by Justice Holmes in the *Schenck* case. It was the one exercise of "calmness" and "good judgment" and yet it is difficult to believe that those who sponsored and supported the original legislation had ever intended such an interpretation. The practicality of advancing some rule of limitation, however weak, when no other limitation was available speaks once again for Holmes' genius. That such legislation might have been declared unconstitutional during those times was probably both impossible and undesirable.[6]

II.

Between the two world wars the nation was growing together. The automobile, the airplane, the motion picture, and the radio permitted the many members of our family to keep in closer touch with one another. Intellectually we were learning "that time has upset many fighting faiths, . . . that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[7] The work of Zechariah Chafee, the American Civil Liberties Union and many liberal publications were of inestimable value in preventing the recurrence of past mistakes.

The litigation of the period took many divergent paths (and some were downward)[8] but for the most part progress from the dark days of World War I was achieved. One new constitutional principle was accepted during this period—the Supreme Court would refrain from imposing its judgment upon state legislatures in matters of legislative policy. Announced in litigation not involving direct questions of civil liberties it came near to plunging the free speech question in wartime back to its old unsavory status.

III.

The days immediately preceding our entrance into World War II did not bode well for the cause of civil liberties. The Alien Registration Act which Professor Chafee promptly dubbed the "peace-time sedition law" was passed. State legislatures enacted all manner of restrictive legislation. Public and private committees hunted down "un-American activity." In spite of this, most of the well-grounded fears were never realized. Credit is due to many—the Attorney Gen-

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[6] We must remember that the minorities were "fanatical" just as the majority was tyrannous. See *supra* note 5.

[7] *Ibid.*, note 6.

[8] See, Chafee, Free Speech in the United States, 357-384 (1941).

eral, the Federal Bureau of Investigation, newspaper and radio commentators, and to the Supreme Court for its impartial but prompt action in *Ex parte Quirin*.[9] A majority of the people were convinced that the agencies of government were capable and prepared to handle all questions of internal security. The administration of the Alien Registration Act became a protection not only to our own security but to hapless aliens who had no belligerent intentions.

The Supreme Court demonstrated in the *Quirin* case that traitor and spy alike would receive all the constitutional safeguards for which our form of government stands, but that there would be no *shilly-shallying* with those caught red-handed. The American people could be calm because there was no need to fear. These are non-legal facts but they are important facts. They meant that law-enforcing agencies could sift the seditious from the irresponsible because no need was felt for vigilantes. Society would permit cases to be investigated by proper authorities. This in turn relieved the judicial system of the strain of many cases irresponsibly begun, but which having been initiated inevitably become public issues.

Only against such a background can the free speech cases of World War II be properly compared with those of World War I. It is a picture so clear that no student of the law can afford to overlook it in surveying his obligations of participation in public affairs.

The issues of free speech in this period have centered around the Jehovah's Witnesses cases. As usual the issues have not been single. Not only freedom of speech, and of press, and of religion, but also of patriotism, loyalty, state's rights and majority rule were wrapped within the packet of briefs in those cases.[10] Indeed in some it was specifically asserted that the issue of free speech was not present at all.[11]

In one of the first cases, Minersville School District v. Gobitis,[12] neither speech nor action but rather the lack of either was involved. The children of a Witness had refused to give the flag salute in violation of a school board regulation treated by the court as directed by the legislature of Pennsylvania.[13] An injunction restraining the members of the board and others from excluding the children from school was reversed because,

> "Where all the effective means of inducing political changes are left free from interference, education in the abandonment of foolish legislation is itself a training in liberty. To fight out the

[9] 317 U. S. 1 (1942).
[10] See Cantwell et al. v. Connecticut, 310 U. S. 296 (1940).
[11] *Ibid.*
[12] 310 U. S. 586 (1940).
[13] *Supra* note 12 at 597.

> wise use of legislative authority in the form of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial area, serves to vindicate the self confidence of a free people.''[14]

Perhaps the Court was too concerned that it preserve its gains in self-limitation established in the Kentucky Tax case to appreciate the implications of its decisions, for at all events it remained for the Chief Justice to warn in dissenting that

> ''The Constitution expresses more than the conviction of the people that democratic processes must be preserved at all costs. It is also an expression of faith and a command that freedom of mind and spirit must be preserved, which government must obey, if it is to adhere to that justice and moderation without which no free government can exist.''[15]

Without now tracing the full course of this decision, it is well to turn to its reversal in *West Virginia State Board of Education v. Barnette*.[16] Here Justices Black and Douglas confess that

> ''Reluctance to make the Federal Constitution a rigid bar against state regulation of conduct thought inimical to the public welfare was the controlling influence which moved us to consent to the Gobitis decision. Long reflection convinced us that although the principle is sound, its application in the particular case was wrong.''[17]

And Mr. Justice Jackson found majority approval in his sterling enunciation of principle, ''that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.''[18]

It was fortunate that *Taylor v. Mississippi*[19] was decided the same day. The court in the *Barnette* case having renounced its *Gobitis* decision saw where that decision might have led if applied in the *Taylor* case. Justice Roberts emphasized the oral statements and the literature disseminated by the defendants were not even claimed ''to have threatened any clear and present danger to our institutions or our government.''[20] If clear and present danger were a valid standard with which to measure words and action, certainly though the cases might be raised by different procedures and under different statutes, it was equally valid that the protection, to paraphrase Mr. Justice

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[14] *Supra* note 12 at 600.
[15] *Supra* note 12 at 606.
[16] 319 U. S. 624 (1943).
[17] *Supra* note 16 at 643.
[18] *Supra* note 16 at 642.
[19] 319 U. S. 583 (1943).
[20] *Supra* note 19 at 589.

Murphy, be extended to the meek and the quiescent as well as to the aggressive and the disputatious.[21]

There have been other Jehovah's Witness cases before the court and cases raising other issues of constitutional liberty but the pattern of decision in those discussed stands as a monument representing what can be done in times of stress if men keep calm. It can hardly be said that any of the decisions were dictated by statutory or constitutional direction so clear that reasonable men might not have differed as to their intent. It cannot be said that these decisions were guided or misguided by any single standard or rule of constitutional interpretation. It may safely be asserted that no rule of interpretation could or did dictate a decision. It is inevitable that rules of constitutional or statutory interpretation help in framing the issues and that whether the opinions are written in the conventional language of interpretation the issues of popular opinion which legislative intention poses forever remain in the cases.

Contrasting the cases from the first World War with those from the present conflict another datum is added to the proposition that the court cannot escape the climate in which it lives. It indicates further that the influence of that climate does not occur at the time of the argument of the cases but depends upon the proper education of the citizenry over long periods of time to the responsibility of free government. This is a task for all of us, and if properly done we may be confident with Thomas Jefferson that this is "the strongest government on earth" and therefore agree with him that

> "If there be any among us who wish to dissolve this union, or to change its republican form, let them stand undisturbed, as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."

[21] "The right extends to the aggressive and the disputatious as well as to the meek and acquiescent." Murphy, J., concurring in Martin v. Sturthers, 319 U. S. 141 at 149 (1943).